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Howard, Erica ORCID logoORCID: <https://orcid.org/0000-0003-0848-5033> (2007) The European year of equal opportunities for all, 2007: is the EU moving away from a formal idea of equality? *European Law Journal*, 14 (2) . pp. 168-185. ISSN 1351-5993 [Article] (doi:10.1111/j.1468-0386.2007.00409.x)

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# The European Year of Equal Opportunities for All—2007: Is the EU Moving Away From a Formal Idea of Equality?

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**Abstract:** *This article will argue that a shift appears to be taking place in the language used within the EU when discussing measures to combat discrimination and to promote equality and equal treatment. The EU appears to be moving from a more formal to a more substantial notion of equality and the need to tackle deep-rooted patterns of inequality experienced by some groups is recognised. But is this move in the language reflected in the measures taken against discrimination or is it just a change in rhetoric?*

## I Introduction

In June 2005, five years after the adoption of landmark European legislation against discrimination,<sup>1</sup> the European Commission issued a policy communication setting out a new framework strategy for EU action on anti-discrimination entitled ‘Non-Discrimination and Equal Opportunities for All’.<sup>2</sup> This communication was

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<sup>1</sup> In 2000 two Directives and an Action Programme against discrimination were adopted: Council Directive 2000/43/EC of 29 June 2000 implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin, [2000] OJ L180/22 (‘the Race Directive’); Council Directive 2000/78/EC of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation, [2000] OJ L303/16 (‘the Framework Directive’); and Council Decision 2000/750/EC of 27 November 2000 establishing a Community Action Programme to combat Discrimination (2001 to 2006), [2000] OJ L303/23 (‘the Action Programme’). Measures against gender discrimination have been in place in the EU from 1975. The main Directive is Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, [1976] OJ L39/40 (‘the Equal Treatment Directive’). The latter has been amended to bring it more in line with the Race and Framework Directives by Council Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC, [2002] OJ L269/15 (‘the Equal Treatment (Amendment) Directive’). Council Directive 2004/113/EC of 13 December 2004 implementing the Principle of Equal Treatment between Men and Women in the Access to and the Supply of Goods and Services, [2004] OJ L373/37 (‘the Equal Treatment (Goods) Directive’) extended the provisions against gender discrimination to include access to and the supply of goods and services. In the following, ‘the Equality Directives’ will refer to the Race Directive, the Framework Directive, the Equal Treatment Directive as amended by the Equal Treatment (Amendment) Directive and the Equal Treatment (Goods) Directive.

<sup>2</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Non-Discrimination and Equal Opportunities for All—A Framework Strategy, COM (2005) 224.

accompanied by a Proposal for a Decision on the European Year of Equal Opportunities for All (2007) Towards a Just Society.<sup>3</sup> Both documents stress that legislation against discrimination should be accompanied by other measures in order to bring change and to ensure true equal opportunities for all persons in the EU. They also emphasise that the EU should aim at a just society where everyone has the same opportunities and that anti-discrimination legislation on an individual level is not enough to tackle deep-rooted patterns of inequality experienced by some groups in society. This appears to suggest that the Commission is moving from a more formal towards a more substantive notion of equality. But what do these ideas mean and are there any other notions of equality possible? This article will first look at different concepts of equality as they are used in anti-discrimination measures and then discuss whether the EU is indeed moving towards a more substantive notion of equality.

## II Concepts of Equality in Anti-discrimination Measures

Put very simply, anti-discrimination measures aim to prohibit discrimination and to promote equality. But what is 'equality' in this context? The term 'equality' can be used in a number of different ways: it can denote formal equality or equality of treatment; substantive equality, which encompasses equality of opportunity and equality of results; and pluralism.<sup>4</sup> Each of these will be discussed below.

### A Formal Equality

Formal equality, also referred to as 'equal treatment', is based on the idea that every person has a right to be treated in an equal way to any other person in the same situation. This is based on the premise that like should be treated alike, which goes back to Aristotle. A good example of an anti-discrimination measure that prescribes equal

<sup>3</sup> Proposal for a Decision of the European Parliament and the Council on the European Year of Equal Opportunities for All (2007) Towards a Just Society, COM (2005) 225. In the following, 'the Year' will refer to the European Year of Equal Opportunities for All.

<sup>4</sup> See on this, eg, N. Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective', (1987) 14:4 *Journal of Law and Society* 411; J. Gregory, *Sex, Race and the Law: Legislating for Equality* (London: Sage, 1987); K. O'Donovan and E. Szyszczak, *Equality and Sex Discrimination Law* (Oxford: Basil Blackwell, 1988), at 1–20; M. MacEwen, *Tackling Racism in Europe: An Examination of Anti-Discrimination Law in Practice* (Oxford: Berg, 1995), at 23–25; I. Bacik, 'Combating Discrimination: The Affirmative Action Approach', in R. Byrne and W. Duncan (eds), *Developments in Discrimination Law in Ireland and Europe* (Dublin: Irish Centre for European Law, 1997), 119–130, at 119–121; R. Townshend-Smith, *Discrimination Law: Text, Cases and Materials* (London: Cavendish Publishing, 1998), at 61–86; C. Barnard, 'The Principle of Equality in the Community Context: *P, Grant, Kalanke and Marshall*: Four Uneasy Bedfellows?', (1998) 57:2 *Cambridge Law Journal* 352; C. Barnard, 'Article 13: Through the Looking Glass of Union Citizenship', in D. O'Keefe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publishing, 1999), 375–395; K. Wentholt, 'Formal and Substantive Equal Treatment: The Limitations and the Potential of the Legal Concept of Equality', in T. Loenen and P. Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (The Hague: Kluwer, 1999), 53–64; C. Barnard and B. Hepple, 'Substantive Equality', (2000) 59 *Cambridge Law Journal* 562; C. Barnard, 'The Changing Scope of the Fundamental Principle of Equality?', (2001) 46:4 *McGill Law Journal* 955; S. Fredman, 'Introduction' and 'Combating Racism with Human Rights: The Right to Equality', in S. Fredman (ed.), *Discrimination and Human Rights The Case of Racism* (Oxford: University Press, 2001), 1–44; S. Fredman, 'Equality: A New Generation?', (2001) 30:2 *Industrial Law Journal* 145; S. Fredman, *Discrimination Law* (Oxford: Clarendon Law Series, 2002); and D. Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?', (2002) 8:2 *European Law Journal* 290.

treatment is the definition of direct discrimination in the Equality Directives. For example, according to Article 2(2)(a) of the Race Directive, 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'.

In this concept, equality lies in consistency and this is where this concept is attractive: it appeals to people's feelings of fairness and justice. According to Fredman, the power of this most basic concept of equality 'derives from the even more elementary notion, that fairness requires consistent treatment'.<sup>5</sup> Therefore, the strong point of this concept of equality in anti-discrimination measures is its focus on fairness and consistency.

However, the concept of formal equality as an aim for anti-discrimination measures has been criticised for a number of reasons. For this article, the most relevant of these are, first, that in this approach everyone is treated in identical fashion and existing inequalities or social disadvantages are not taken into account. The concept does not look at any imbalances that have been created by past discrimination.

Second, because of its focus on equal treatment and on sameness, this notion ignores and negates the value of difference. This notion, therefore, leaves no room for any recognition of the positive aspects of difference or for a requirement that people should be treated appropriately according to their differences.

Third, sometimes anti-discrimination measures provide for positive action or preferential treatment of historically disadvantaged groups, but because formal equality is symmetrical, there is no room for such measures, as these would give preferential, and thus unequal, treatment to certain people. We will come back to positive action measures below.

## *B Substantive Equality*

In attempts to overcome the problems associated with the notion of formal equality, other concepts of equality have been suggested. Because formal equality is perceived as not touching the substantive inequalities that exist in most societies, or even as reinforcing these, a more substantive equality, which is sensitive to the effects of past and ongoing discrimination, is put forward. Substantive equality aims to compensate for the social disadvantages suffered by certain groups. The focus is on the material reality of people's lives. The concept can be in direct conflict with the idea of formal equality because it may require unequal treatment. Bacik<sup>6</sup> writes that the concept of substantive equality is 'based upon difference'. This means that 'in order to create equality, persons must be treated differently according to their needs'. The concept of substantive equality suggests that equality laws should be sensitive to the practical results of equal treatment.

Whereas formal equality can be seen as symmetrical, substantive equality is asymmetrical, in that it allows unequal treatment in order to rectify social disadvantages and so achieve the goal of equality in fact.

An example of a more substantive concept of equality can be found in the Equality Directives, where they allow for positive action. For example, Article 7 of the Framework Directive, headed 'positive action', determines that 'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1'.

<sup>5</sup> Fredman, *Discrimination Law*, *op cit* n 4 *supra*, at 7.

<sup>6</sup> Bacik, *op cit* n 4 *supra*, at 119–120.

The main problem with positive action measures is that they are going against the principle of equal treatment, that they themselves constitute discrimination: preferential treatment of some is worse treatment of others and this is seen by some as 'unfair', although others see it as justified because of the inequalities suffered through historical discrimination.

Within the concept of substantive equality two types can be distinguished: equality of opportunity and equality of results. Anti-discrimination measures intending to achieve the first, aim to equalise the starting point for everyone so that everyone can compete on the same level; while measures intending to achieve the second, aim to equalise the outcome or result.

The inclusion of a concept of indirect discrimination in anti-discrimination legislation can be seen as promoting substantive rather than formal equality, because it takes account of differences and of the disparate impact equal treatment can have. For example, an employer who prohibits employees wearing any type of head covering would not discriminate directly against any employee, because the prohibition applies to all employees equally. However, the employer would discriminate indirectly against those employees who cannot comply because they wear head coverings for religious reasons (like turbans, head scarves or skull caps). The Equality Directives all contain a similar definition of indirect discrimination. According to Article 1(2) of the Equal Treatment (Amendment) Directive, indirect discrimination occurs 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex . . .'. Opinions are divided on whether indirect discrimination is an example of a legislative measure that aims at equality of opportunity or at equality of results. Some writers describe it simply as promoting substantive equality.<sup>7</sup>

#### *a) Equality of Opportunity*

This form of equality concentrates on equalising the starting point for all, on giving everyone the same opportunities. This approach may well involve unequal treatment and unequal finishing points, because it is not concerned with the end result; it only aims to make the starting point equal for all. Equality of opportunity recognises that the effects of past discrimination can make it very difficult for members of particular groups to even reach a situation of 'being alike' so that the right to like treatment becomes applicable. To remedy the disadvantage that some groups suffer, positive measures for these groups are encouraged or even required. An example of a positive action measure aimed at equality of opportunity would be an employer's training scheme for female employees only.

The concept of equality of opportunity as a basis for anti-discrimination measures has been criticised for not being interested in the outcome. Equalising the starting line by removing obstacles for people from disadvantaged groups does not necessarily lead to a more equal society.

#### *b) Equality of Results*

This concept is also referred to as equality of outcome or impact. It takes into account existing inequalities and disadvantages caused by past discrimination and aims to

<sup>7</sup> Discussion of this falls outside the subject of this article. For more information, the reader is referred to Bacik; Fredman, 'Equality: A New Generation?'; Fredman, *Discrimination Law*; Barnard and Hepple; and Schiek, all *op cit* n 4 *supra*.

remedy these by equalising the outcome or result. It aims to establish a fairer distribution of goods and resources in society, and looks to achieve a more representative participation of all groups in public life. Townshend-Smith describes equality of outcome as 'a notion which pays at least some regard to the distribution of outcomes between various different groups'.<sup>8</sup> Later on he writes that 'equality of outcome implies an equitable division of the economic cake between different groups in society'.<sup>9</sup>

As we have seen, both the concept of equality of opportunity and that of equality of results would allow or even require positive action measures for the previously disadvantaged groups. However, in the latter concept, these would go further and include the setting of quotas and targets.

The concept of equality of results remedies the objection made against the concept of equality of opportunity in that it focuses on outcomes. But there are also some problems with this notion of equality. First, like the notion of equality of opportunity, it appears to go against the principle of equality and non-discrimination and against people's feelings of fairness and justice, as it allows or requires preferential treatment of people belonging to certain groups.

Townshend-Smith points out a second problem with equality of results. Its aim of redistribution of wealth is intertwined with the relief of poverty. But why then should only certain victims of poverty (black people, women) and not others be entitled to such relief?<sup>10</sup> This point is connected to the point O'Donovan and Szyszczak<sup>11</sup> make, that 'it is evident that the creation of outcome equality would require a major social revolution'.

Another problem is that, despite the fact that this model aims at redistribution, this might not necessarily be the result because the outcome depends on the way the model is used. Fredman writes that the 'underlying redistributive aims may only be partially achieved'. She gives two reasons for this: first, 'monitoring of results does not necessitate any fundamental re-examination of the structures that perpetuate discrimination'; and, second, 'there is a danger that a focus on equality of results pays too little attention to the equally important notion of equality of diversity; or the duty to accommodate diversity by adapting existing structures'.<sup>12</sup>

A fourth problem is that there are disadvantages linked to the setting of quotas. Gregory<sup>13</sup> mentions:

Although a system of quotas produces rapid and dramatic results, its application in the job market would tend to accentuate rather than dissipate racial hostility. If it entailed the selection of people with inferior qualifications merely because they were black or female (or both), those selected might feel patronised and those not selected might see themselves as a new class of victim.

MacEwen<sup>14</sup> criticises quotas thus:

In particular the result may involve the less well-qualified, and potentially less deserving, getting a job, a house or a promotion to make up the numbers, and in doing so discriminating against better qualified white applicants who feel no great need to shoulder the burden of rectifying historical disadvantage.

<sup>8</sup> Townshend-Smith, *op. cit.* note 4 *supra*, at 61.

<sup>9</sup> *ibid.*, at 73.

<sup>10</sup> *ibid.*, at 80.

<sup>11</sup> O'Donovan and Szyszczak, *op. cit.* n 4 *supra*, at 6.

<sup>12</sup> Fredman, 'Combating Racism with Human Rights: The Right to Equality', *op. cit.* n 4 *supra*, at 20.

<sup>13</sup> Gregory, *op. cit.* n 4 *supra*, at 64–65.

<sup>14</sup> MacEwen, *op. cit.* n 4 *supra*, at 24.



Such reverse discrimination is often unlawful, but perhaps more importantly it is seen to be unfair; it denies everyone a fair chance and is in breach of the concept of natural justice.

Thus, again, the importance of treatment being seen to be fair and just is stressed.

### *C Pluralist Approach to Equality*

A pluralist approach to equality would aim to create a society where differences and diversity between groups and individuals are considered an asset to be celebrated and where everyone is treated with the same respect. In such a society, diversity is seen as a positive attribute and equal respect and concern is accorded to every person and to his/her values and way of life. There would be acceptance of distinctive cultures and identities and people would be treated in accordance with their own requirements and aspirations. Society would be based on respect for and tolerance of differences and diversity, and strive to integrate minority communities rather than assimilate them. In this concept, anti-discrimination measures would aim to create 'an atmosphere of mutual tolerance' between people of different groups. One way of doing this is by prohibiting intolerance and its manifestations, like discrimination. In this sense all measures prohibiting discrimination aim to promote tolerance. But measures in the pluralist approach would go further. They could, for example, contain a government statement that cultural diversity is to be respected or they could put a positive duty on authorities and employers to eliminate discrimination and to respect diversity. They could also lay down a commitment to mainstreaming equality and respect for diversity: making equality and respect for diversity one of the factors that have to be taken into account in every policy and executive decision.

### *D Conclusion*

From the above it will be clear that it is not always possible to draw a clear dividing line between the different concepts of equality we have distinguished. The line between equality of opportunity and equality of results is particularly fine and is often no more than a difference in degree. All the concepts overlap and frequently measures contain aspects from more than one concept. Keeping this in mind, the next part will look at the concept of equality in EU anti-discrimination measures.

## **III The EU's Concept of Equality**

### *A EU Legislative Measures*

Can we distinguish any of our concepts of equality in EU equality and non-discrimination measures? We will first look at the main legislative measures—the Equality Directives mentioned above.<sup>15</sup>

All these directives state in the first article that their purpose is to put the principle of equal treatment into effect in the Member States. They continue that the principle of equal treatment shall mean that there shall be no direct or indirect discrimination on the grounds covered by each directive. As we have seen, the Equality Directives all contain a definition of direct discrimination that prohibits less favourable treatment of

<sup>15</sup> *Op cit* n 1 *supra*.

a person in comparison with another person on grounds of his/her sex (the Equal Treatment (Amendment) and (Goods) Directives), racial or ethnic origin (the Race Directive), religion or belief, disability, age or sexual orientation (the Framework Directive). This reflects clearly a formal notion of equality, prescribing equal treatment with a person in the same circumstances.

The Equality Directives also prohibit indirect discrimination, which, as mentioned, is taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons. This goes some way towards promoting substantive equality. From the definition it will be clear that indirect discrimination takes account of differences and of the impact of seemingly neutral provisions or measures, applied to all persons equally. In cases of indirect discrimination, people are treated equally, the same provision is applied equally to everyone, but the effect will be more disadvantageous for some people and will have a disparate impact of them. Therefore, the concept of indirect discrimination recognises that equal treatment can have a discriminatory effect on some as a result of historical and structural impediments to equality. The concept does, therefore, aim to compensate for past inequality and disadvantage. However, the Equality Directives allow for justification of indirect discrimination: there is no discrimination if the provision, criterion or practice is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.<sup>16</sup> So even if there is a disadvantage, a barrier, this might not be against the law if business or administrative interests objectively justify it. Therefore, this move towards a more substantive equality concept is tempered by the possibility of justification: indirect discrimination is not always against the law.

Another indication of legislation aiming at a more substantive notion of equality would be if it provided for positive action measures. The Equality Directives do allow for such action. The Explanatory Memorandum to the Proposal for the Race Directive states with regard to Article 5: Positive Action: 'Equal treatment by itself may not be enough if it does not overcome the weight of accumulated disadvantage suffered by discriminated groups. Article 4 allows Member States to authorise legislative or administrative measures which are necessary to prevent or correct situations of inequality'.<sup>17</sup>

This expresses a fairly clear idea of substantive equality. However, the directives allow for, but do not require, positive action. In other words, they do not put any obligation on Member States to take such measures and if they do not they are not contravening any European legislation. So, here again, the move towards a more substantive idea of equality is tempered by the non-obligatory nature of the provision.

There is no indication in the directives as to what sort of positive action is allowed and how far this action can go. On the one hand, in its case-law on positive action measures in relation to women, the European Court of Justice (ECJ) has recognised that Article 2(4) of the 1976 Equal Treatment Directive allows measures which 'are

<sup>16</sup> See, eg, Art 2(2)(b) of the Race Directive. EU law is not the only legislation to allow for justification of indirect discrimination. Most national and international legal measures against indirect discrimination do so as well. Sometimes justification of direct discrimination is also allowed. The Race and Equal Treatment (Amendment) Directives do not allow for justification of direct discrimination, but the Equal Treatment (Goods) Directive allows for justification of direct discrimination in Art 4(5) and the Framework Directive allows for justification of direct age discrimination in Art 6.

<sup>17</sup> Proposal for a Council Directive implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin, COM (1999) 566, at 6. In my view Art 4 in this quote should read Art 5.



intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life'.<sup>18</sup> It has also held that 'the result pursued by the Directive is substantive, not formal equality'.<sup>19</sup> On the other hand, the ECJ has limited the extent of the measures allowed under Article 2(4) of the 1976 Equal Treatment Directive and Article 141(4) EC by excluding programmes which involve automatic preferential treatment at the point of selection for employment and by determining that positive measures should be limited to the period necessary to overcome the disadvantage.<sup>20</sup> In other words, in the sex discrimination field, the ECJ appears to hold that positive action within the equality of opportunity model is allowed, but that positive action which goes further and fits within the equality of results model is not. Poiares Maduro writes: 'the case law of the ECJ regarding affirmative action measures has therefore been framed largely by the notion of equality of opportunities'.<sup>21</sup>

But will the ECJ use the same interpretation for positive action under the new Equality Directives or will it allow for more far-reaching measures that come closer to the equality of results model? This is yet to be decided. Some arguments can be advanced for allowing a broader interpretation because, first, the Article 13 EC Directives allow for positive measures 'with a view to ensuring full equality in practice', which, as Schiek<sup>22</sup> argues, appears to indicate that these directives do go further and are aiming for equality of results. She writes:

Neither of the directives thus uses the term 'equal opportunity' from the old Gender Equality Directive, which led both Advocates General Tesauro and Jacobs in their conclusions on *Marschall* and *Kalanke* respectively to assume that positive action measures aiming at results are inadmissible. On the contrary, aiming to 'ensure full equality in practice', the directives appear to envisage result-oriented as well as procedural measures.

Second, the case-law of the ECJ is partly based on its interpretation of Article 2(4) of the 1976 Equal Treatment Directive, but this Article has been deleted by the Equal Treatment (Amendment) Directive. This argument is also used by Poiares Maduro, who writes that the scope of Article 141(4) EC and the Article 13 EC Directives<sup>23</sup> might broaden the scope of admissibility of affirmative action measures.<sup>24</sup>

Third, there might be some room for a broader interpretation in the case of racial or ethnic origin discrimination because the scope of the Race Directive goes beyond the employment field. The ECJ might decide to allow broader positive action measures in

<sup>18</sup> Case C-312/86, *Commission v France* [1888] ECR 6315, para 15. This is repeated in Case C-450/93, *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, para 18; and Case C-409/95, *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, para 26.

<sup>19</sup> Case C-136/95, *CNAVTS v E. Thibault* [1998] ECR I-2011, para 26. Case C-158/97, *Badeck's Application* [2000] ECR I-1875, para 32, Case C-407/98, *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539, para 48 and Case C-319/03, *Serge Briheche v Ministre de l'Interieur, Ministre de l'Education Nationale and Ministre de la Justice*, judgment of 30 September 2004, para 25, all combine what the ECJ held in *Commission v France*, *op cit* n 18 *supra*, and in *Thibault*.

<sup>20</sup> See, eg, *Kalanke* and *Marschall*, *op cit* n 18 *supra*; *Badeck's Application* and *Abrahamsson*, *op cit* n 19 *supra*. For a detailed discussion of positive action and the different concepts of equality, including the cases mentioned, see Fredman, *Discrimination Law*, *op cit* n 4 *supra*, at 125–160.

<sup>21</sup> M. Poiares Maduro, 'The European Court of Justice and Anti-Discrimination Law', (2005) 2 *European Anti-Discrimination Law Review* 21, at 25.

<sup>22</sup> Schiek, *op cit* n 4 *supra*, at 299.

<sup>23</sup> 'Article 13 EC Directives' refers to the Race, Framework, Equal Treatment (Amendment) and Equal Treatment (Goods) Directives, which were all adopted on the basis of Article 13 EC.

<sup>24</sup> Poiares Maduro, *op cit* n 21 *supra*, at 26.

the other areas covered. Support for this can be found in the *Lommers* case,<sup>25</sup> in which the ECJ upheld an employer's scheme that provided subsidised nursery places only for female employees (save in exceptional circumstances). This third argument can also be used in relation to the Equal Treatment (Goods) Directive.

However, it can also be argued, as Waddington and Bell<sup>26</sup> do, that the text of the Race Directive is more restrictive than Article 141(4) EC. This article reads:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The text of the Race Directive, according to these authors, omits the positive element of Article 141(4) EC, notably the possibility of conferring specific advantages to make it easier for the under-represented sex to pursue a vocational activity. Waddington and Bell anticipate 'that the Court will seek to extend these general principles on positive action to the other grounds of discrimination enumerated in Article 13 EC', although they do admit that 'there remains a variety of positive action schemes that have yet to be tested'.<sup>27</sup> It is to be hoped that the ECJ will indeed interpret the new measures in a broader way and allow more result-oriented positive action measures.

We can conclude that the EU legislation against discrimination aims at establishing formal equality and contains some tentative and circumscribed steps towards a more substantive concept of equality. But do other legislative or non-legislative measures show a more concrete move towards such an idea or towards a more pluralist approach to equality?

The EU policy of mainstreaming can be seen as such a measure. Article 3(2) EC prescribes gender mainstreaming: 'In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and promote equality, between men and women'. The Equal Treatment (Amendment) Directive also contains a gender mainstreaming duty, in Article 1: 'Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1'.

In the 1998 Action Plan against Racism, the Commission writes that it 'will actively develop a mainstreaming approach to combating racism and discrimination and promoting integration across all relevant sectors'.<sup>28</sup> The duty to mainstream equality would be extended to all the grounds of discrimination mentioned in Article 13 EC by the Draft Constitution of the European Union.<sup>29</sup> Article III-118 states: 'In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

However, it is not clear if and when the Draft Constitution will come into force and, therefore, the legal mainstreaming duty is, at present, only applicable to gender

<sup>25</sup> Case C-476/99, *Lommers v Ministerie van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891, para 37.

<sup>26</sup> L. Waddington and M. Bell, 'More Equal than Others: Distinguishing European Union Equality Directives', (2001) 38 *Common Market Law Review* 587, at 602. See also C. Brown, 'The Race Directive: Towards Equality for All the Peoples of Europe?', (2002) 21 *Yearbook of European Law* 195, at 204.

<sup>27</sup> Waddington and Bell, *op cit* n 26 *supra*.

<sup>28</sup> Communication from the Commission, An Action Plan Against Racism, COM (1998) 183, at 3.

<sup>29</sup> Constitution of the European Union, [2004] OJ C310/1.

discrimination. Mainstreaming means that the government and other public bodies should attempt to consider equality and non-discrimination in all their decision making. This should be done by involving the views of the affected groups themselves.<sup>30</sup> A mainstreaming duty, a duty to take equality into account in all decision making, would go beyond a formal equal treatment concept of equality. It would be anticipatory in that it tries to prevent discriminatory effects by an assessment in advance. In that it takes account of the views of those affected it would be more participatory. A mainstreaming duty thus has elements of both substantive equality and pluralism. However, as Bell<sup>31</sup> concludes his discussion of the new mainstreaming duties in the Draft EU Constitution: 'the effectiveness of the mainstreaming duties will heavily depend on their practical implementation. Existing experience with gender mainstreaming by the European Union confirms the challenges in translating this principle into consistent, everyday practice'.

### *B Other EU Measures*

Some earlier documents within the EU mentioned the importance of integration and participation of all in society and the value of diversity in passing, but contained few specific policy measures to achieve this.<sup>32</sup> However, the annual Employment Guidelines, adopted by the Council under the Community Employment Strategy, must be mentioned. The 1999 Guidelines consider, under the heading 'promoting a labour market open to all', that 'many groups and individuals experience particular difficulties in acquiring relevant skills and in gaining access to, and remaining in the labour market'. The Guidelines require the Member States to 'give special attention to the needs of the disabled, ethnic minorities and other groups and individuals who may be disadvantaged, and develop appropriate forms of preventive and active policies to promote their integration into the labour market'.<sup>33</sup>

In this, we can discern a recognition that some groups in society are disadvantaged when it comes to participation in the labour market and a request to the Member States to develop preventive and active policies, in other words policies to make up for these disadvantages. Promoting integration and combating discrimination against people at a disadvantage in the labour market has been part of the guidelines since then.<sup>34</sup> This fits in with the substantive and pluralist notions of equality. The European Employment Strategy uses the open method of coordination (OMC) procedure. Under the Employment OMC, the Council adopts annual guidelines for employment and the

<sup>30</sup> For a report on mainstreaming in the EU, see J. Shaw, *Mainstreaming Equality in European Union Law and Policy Making* (Brussels: European Network Against Racism, 2004).

<sup>31</sup> M. Bell, 'Equality and the European Constitution', (2004) 33:3 *Industrial Law Journal* 242, at 255.

<sup>32</sup> See, eg, Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 23 July 1996 concerning the European Year against Racism (1997), [1996] OJ C237/1, Arts 1(e), 1(f) and 2(d); Report from the Commission on the Implementation of the European Year against Racism (1997), COM (1999) 268, at 24; An Action Plan Against Racism, *op cit* n 28 *supra*, at 3; and Council Decision of 3/12/2001 on the European Year of People with Disabilities 2003, [2001] OJ L335/15, Art 2(e).

<sup>33</sup> Council Resolution on the 1999 Employment Guidelines, [1999] OJ C69/2, point I-9. For information on the Employment Strategy in relation to the fight against racism, see M. Bell, 'Combating Racial Discrimination Through the European Employment Strategy', in J. Bell and C. Kilpatrick (eds), *Cambridge Yearbook of European Legal Studies 2003-2004*, Vol 6 (Oxford: Hart, 2005), 55-71.

<sup>34</sup> See Employment Guidelines, [2000] OJ L72/15, guideline 9; [2001] OJ L22/18, guideline 7; [2002] OJ L60/60, guideline 7; and [2003] OJ L197/13, guideline 7.

Member States make up National Action Plans to report on their progress towards these guidelines. The Council and the Commission then make up a joint Employment Report which monitors progress and sets priorities for the coming year. Therefore, the Guidelines depend on peer review and exchange of good practices in order to monitor progress towards agreed goals. So, although the Guidelines are not judicially enforceable, they could play an important role in the integration of people at a disadvantage in the labour market. They are, however, limited to the employment sphere.

It appears that, apart from the legislative instruments and the Employment Guidelines, there have been few specific policy instruments aiming to establish substantive or pluralist concepts of equality. However, recently the term 'equal opportunities' has been used more frequently in relation to EU anti-discrimination policies. First, in 2004, a new European Commission was installed and Vladimir Spidla became the new Commissioner for Employment, Social Affairs and Equal Opportunities. This was the first time that equal opportunities were specifically mentioned in the title of a Commissioner. At the same time, the creation of a Group of Commissioners responsible for fundamental rights, anti-discrimination and equal opportunities was announced.<sup>35</sup>

Second, Mr Spidla mentioned equal opportunities and the need to tackle patterns of inequality on a number of occasions. For example, in his opening address to the Dutch EU Presidency Conference on Anti-discrimination, he said: 'I would like, above all, to push for the incorporation of equal opportunities in all policies – commonly referred to as “mainstreaming”'.<sup>36</sup> And, in June 2005, at a Conference on Mainstreaming Diversity, Spidla ended his speech with: 'Europe cannot be content with formal equality. It must work towards achieving genuine equality for everyone'.<sup>37</sup> In an interview with *Equal Rights in Practice*,<sup>38</sup> he said: 'But I think we can all agree that laws in themselves – even when fully implemented and enforced – are not enough to tackle some of the ingrained patterns of inequality in our society'.

This use of the 'language of equal opportunities' in the Community anti-discrimination context appears to be even stronger in the Commission's Communication on the framework strategy for non-discrimination and equal opportunities for all<sup>39</sup> and the Proposal to designate 2007 as the European Year of Equal Opportunities for All.<sup>40</sup> According to Barbara Nolan, head of the Anti-discrimination Unit in the European Commission, with the Communication and the Proposal the Commission wants 'to look at what else the EU can do to promote equality, beyond legal protection of people's right to equal treatment'.<sup>41</sup>

<sup>35</sup> J. M. Barroso, Speech to the European Parliament (SPEECH/04/47, 26 October 2004), available at <http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/474&format=PDF&aged=1&language=EN&guiLanguage=en>.

<sup>36</sup> Opening Address by Commissioner V. Spidla to the EU Dutch Presidency Conference on Anti-Discrimination, Scheveningen, *Equality in the Europe of Tomorrow* (22 November 2004), at 4, available at [http://www.ec.europa.eu/employment\\_social/emplweb/spidla/index\\_en.cfm](http://www.ec.europa.eu/employment_social/emplweb/spidla/index_en.cfm).

<sup>37</sup> Opening Address by Commissioner V. Spidla to the EU Luxembourg Presidency Conference on Anti-Discrimination, Mondorf-les-Bains, *Mainstreaming Diversity* (27 June 2005), available at [http://www.ec.europa.eu/employment\\_social/emplweb/spidla/index\\_en.cfm](http://www.ec.europa.eu/employment_social/emplweb/spidla/index_en.cfm).

<sup>38</sup> *Equal Rights in Practice, News Review of the Community Action Programme to combat Discrimination* (2005), Vol 4, at 2, available at [http://www.ec.europa.eu/comm/employment\\_social/fundamental\\_rights/index\\_en.htm](http://www.ec.europa.eu/comm/employment_social/fundamental_rights/index_en.htm).

<sup>39</sup> *op cit* n 2 *supra*.

<sup>40</sup> *op cit* n 3 *supra*.

<sup>41</sup> July 2005 Spotlight, *Commission Adopts Policy Communication on Anti-discrimination*, available at [http://www.ec.europa.eu/employment\\_social/fundamental\\_rights/spot/july05\\_en.htm](http://www.ec.europa.eu/employment_social/fundamental_rights/spot/july05_en.htm).

In the Introduction to the Communication, the European legislation against discrimination is described as ‘some of the most comprehensive and far-reaching anti-discrimination legislation to be found anywhere in the world’. The Commission emphasises that full and effective implementation and enforcement of this legal framework must be ensured. However, this is followed by the consideration that:

It is clear that the implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups. There is a need to go beyond anti-discrimination policies designed to prevent unequal treatment of individuals. The EU should reinforce its efforts to promote equal opportunities for all, in order to tackle the structural barriers faced by migrants, ethnic minorities, the disabled, older and younger workers and other vulnerable groups.<sup>42</sup>

Later in the Communication, the Commission states:

... it is difficult for legislation alone to tackle the complex and deep-rooted patterns of inequality experienced by some groups. Positive measures may be necessary to compensate for long-standing inequalities suffered by groups of people who, historically, have not had access to equal opportunities.

The EU’s experience in the field of gender equality strongly suggests that protection of individual rights must be backed up by accompanying measures in order to bring about lasting change and to promote genuine equal opportunities for all.<sup>43</sup>

One of the accompanying measures the Commission suggests is the promotion of mainstreaming of non-discrimination and equal opportunities for all in relevant EU policies. The Commission will also seek to promote exchanges of good practice, cooperation and networking between all stakeholders in the field of discrimination.

All this shows clearly that, at the EU level, there is now a recognition of the need to go beyond the prevention of unequal treatment, in other words, beyond a mere formal concept of equality. There is also an acknowledgement that positive action may be necessary to compensate for the structural barriers and long-standing and deep-rooted inequalities that some groups experience. This has prevented these groups from having access to equal opportunities. This shows clearly a more substantive notion of equality.

The Communication then announces:

In order to drive forward the agenda outlined in the Communication for a *more positive approach to equality*, the Commission is proposing to designate 2007 as the European Year of Equal Opportunities for All ...

The Year will aim to: inform people of their rights to protection against discrimination under European and national law; celebrate diversity as an asset for the EU; and to promote equal opportunities for all in economic, social, political and cultural life.<sup>44</sup>

The Commission recognises that ‘enlargement has increased the EU’s diversity in terms of culture, language and ethnicity’ and that ‘one of the key challenges facing the enlarged EU is the need to develop a coherent and effective approach to the social and labour market integration of ethnic minorities’. To deal with this, the EU ‘needs to develop appropriate responses to the different needs of new migrants, established minorities of immigrant origin and other minority groups’.<sup>45</sup>

The conclusion reiterates that ‘in addition to the legal protection of individual rights, this Communication sets out a strategy for the positive and active promotion of

<sup>42</sup> *op cit* n 2 *supra*, at 2.

<sup>43</sup> *ibid*, at 6.

<sup>44</sup> *ibid*, at 8–9 (emphasis added).

<sup>45</sup> *ibid*, at 9–10.

non-discrimination and equal opportunities for all'.<sup>46</sup> Again, there are clear signs of a move towards more substantive and pluralist notions of equality in all this. Can we detect these in the Proposal for the Year as well?

The Explanatory Memorandum to the Proposal states in its introduction:

The global objective of the Year will be to raise awareness of the benefits of a just, cohesive society where there is equality of opportunity for all. This will require tackling barriers to participation in society and promoting a climate in which Europe's diversity is seen as a source of socio-economic vitality.<sup>47</sup>

It considers that the Year 'will provide an opportunity to promote a more cohesive society that celebrates differences within the framework of EU core values . . .'. Article 2 gives the specific objectives of the year: rights, representation, recognition and respect and tolerance. 'Rights' refers to the raising of awareness on the right to equality and non-discrimination and of the existing anti-discrimination legislation. 'Representation' means the promotion of full and equal participation of all groups in society. 'The disadvantages suffered by some communities . . . are so wide-scale and embedded in the structure of society, that positive action may be necessary to remedy the nature of their exclusion'. 'Recognition' indicates the celebration and accommodation of diversity. As Article 2(c) states: 'The European Year will highlight the positive contribution that people, irrespective of their sex, racial or ethnic origin, religion or beliefs, capacities, age and sexual orientation can make to society as a whole, in particular by accentuating the benefits of diversity'.

'Respect and tolerance' relates to the promotion of a more cohesive society. Key to this will be the promotion of good relations between different communities and building trust and understanding, and work to eliminate stereotypes and prejudices.<sup>48</sup> There is also an interesting point in the legislative financial statement. Where this looks at the specific objectives, it mentions that 'a key challenge will be to demonstrate that the notion of "equality" does not mean "sameness" but rather taking account of differences and diversity to ensure equal treatment'. It also states that 'equal opportunities policy is not simply limited to the elimination of discrimination. It also requires equalising the opportunities to full and equal participation for all'.<sup>49</sup>

It will be clear that there are elements of the concepts of substantive equality in the Proposal: a society where there is equal opportunity for all and where structural disadvantages, barriers and inequalities affecting several communities may necessitate positive action. Other aspects of the Proposal fit in well with the pluralist approach to equality: tackling barriers to participation to aim at the full and equal participation of all groups in society and the celebration and accommodation of diversity; and the promotion of good relations, trust and understanding between different communities.

### *C True Commitment or Rhetoric?*

There are clearly quite strong elements of both substantive equality and pluralism in these two papers and there appears to be a commitment to attack structural disadvantages suffered by some groups. But is this just rhetoric? Is this just using the 'language of equal opportunities' or is this translated into practical policies?

<sup>46</sup> *ibid*, at 12.

<sup>47</sup> *op cit* n 3 *supra*, at 2.

<sup>48</sup> *ibid*, at 2–5 and Art 2.

<sup>49</sup> *ibid*, at 25.



The Communication<sup>50</sup> proposes the development of tools to promote mainstreaming of non-discrimination and equal opportunities for all in relevant EU policies, not only in relation to gender discrimination, but also in relation to discrimination on the other grounds mentioned in Article 13 EC. It mentions that the Commission carries out an 'impact assessment' of all new proposals: any proposal for legislation and any draft instrument to be adopted will, as part of the normal decision-making procedures, be scrutinised for compatibility with the Charter of Fundamental Rights of the European Union.<sup>51</sup> This Charter<sup>52</sup> contains a right to equality before the law and a prohibition of discrimination on a large number of grounds, including all those mentioned in Article 13 EC.<sup>53</sup> Therefore, any draft instruments will be scrutinised for compatibility with the right to equality and non-discrimination. There appears thus a genuine commitment to mainstreaming non-discrimination and equal opportunities, which fits in with the substantive notion of equality.

The Commission will aim to ensure that a range of EU funding instruments contribute to the promotion of non-discrimination and equal opportunities for all, especially through promoting exchanges of good practice, cooperation and networking between national authorities, specialised equality bodies, organisations working with victims of discrimination and other stakeholders. The Commission also proposes an annual high-level Equality Summit to bring together key stakeholders.<sup>54</sup> Because stakeholders and organisations could learn from each other's experiences, this could lead to more protection for victims and disadvantaged groups, but it is difficult to assess this and thus it is difficult to link it to one of our notions of equality. Involving all stakeholders could mean more participation for people from disadvantaged groups, although this is not necessarily so. If it does, there is an element of pluralism in this.

To support policy development to tackle discrimination and social exclusion faced by disadvantaged ethnic minorities, the Commission plans to establish a high-level advisory group on social and labour market integration of these disadvantaged ethnic minorities.<sup>55</sup> This does recognise that there are disadvantaged minorities and as such fits in with the substantive idea of equality, and if the recommendations of this group actually do lead to policy development to create greater inclusion, then it would also fit with the pluralist notion of equality.

According to Article 3 of the Proposal for the Year, the actions designed to meet the objectives of the Year shall entail development of and provision of support for meetings and events; information and promotional campaigns; cooperation with media, business and enterprise; and surveys and studies on a Community or a nation-wide scale. The

<sup>50</sup> *op cit* n 2 *supra*, at 6–7.

<sup>51</sup> SEC (2001) 380, at 2. A methodology for systematic and rigorous monitoring, based on this SEC document has been set out in Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals, COM (2005) 172. See also President Barroso Proposes a New Framework to 'Lock-In' a Culture of Fundamental Rights in EU Legislation (IP/05/494, 27 April 2005). All EU Press Releases are available at <http://www.europa.eu/rapid/>.

<sup>52</sup> Charter of Fundamental Rights of the European Union, [2000] OJ C364/1 ('the Charter'). The EU Council approved the Charter in October 2000, but it was not included in the Treaty agreed in Nice in December 2000. The Charter has become Part II of the Draft European Constitution, *op cit* n 29 *supra*. It has, as yet, no legal force.

<sup>53</sup> Articles II-80 and II-81.

<sup>54</sup> *op cit* n 2 *supra*, at 7–9.

<sup>55</sup> *ibid*, at 10.

Annex<sup>56</sup> provides details of the actions. These include raising awareness and disseminating the principles and underlying values of the Year, which are presumably equal opportunities for all and the objectives laid down in Article 2. Unfortunately, this all seems rather vague and lacking in tangible measures, policies or actions. However, if public awareness about the importance of an inclusive society, about the positive contribution that all people, irrespective of their sex, racial or ethnic origin, religion or beliefs, capacities, age and sexual orientation make to society as a whole and about the benefits of diversity is raised, then this does go some way towards a pluralist approach to equality.

According to the Commission, the 2006 Work Plan under the Community Action Programme 2001–2006 incorporates the 2005 Communication and the Proposal.<sup>57</sup> The proposed plan contains some new activities: first, three studies will be conducted designed to improve the understanding of the concept of roots and causes of discrimination. The subjects will be multiple discrimination, socially disadvantaged minorities and the level of participation of people with disabilities. The studies should produce recommendations. Second, the Commission announced a Eurobarometer survey on attitudes towards diversity. Whether all this will lead to more equal opportunities and greater participation of disadvantaged groups depends on what is done with the outcomes of the studies and the survey.

The Commission has followed up the Communication and the Proposal by some action. First, in January 2006, a Commission Decision established a High-level Advisory Group<sup>58</sup> with the task of analysing how to achieve better social integration of ethnic minorities and their full participation in the labour market within the EU. This group should submit a report containing recommendations on the policies to be implemented in this connection before the end of the 2007 European Year of Equal Opportunities for All.

Second, in a Press Release on 1 June 2006,<sup>59</sup> the Commission welcomed the Decision of the Council and the European Parliament to designate 2007 as European Year of Equal Opportunities for All and announced a new website for the Year.<sup>60</sup> Equal opportunities for all continue to be stressed and a number of interesting points can be made about the website. Under ‘Why a European Year?’ we find the following consideration: ‘Calling for equal rights and adopting laws to try and guarantee them is not enough to ensure equal opportunities are available for all in practice’. Three suggestions as to how equal opportunities for all should be ensured are giving incentives to bring about a change in behaviour and mentality; tackling patterns of inequality; and meeting more effectively the challenges of ever-growing diversity. Under ‘The Year’s four key themes’, in relation to awareness-raising, it is stated: ‘The idea will also be to show that being equal does not [mean] being identical. The implementation of the equality principle has to take into account differences and diversity so as to ensure that each individual genuinely enjoys equal treatment’.

<sup>56</sup> *op cit* n 3 *supra*, at 15–17.

<sup>57</sup> *Annual Plan of Work and Budget Breakdown* (January–December 2006), available at [http://www.europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/prog/planprogbud2006\\_en.pdf](http://www.europa.eu.int/comm/employment_social/fundamental_rights/pdf/prog/planprogbud2006_en.pdf).

<sup>58</sup> Commission Decision 2006/33/EC of 20 January 2006 establishing a High-level Advisory Group on Social Integration of Ethnic Minorities and their full Participation in the Labour Market, [2006] OJ L21/20. See also IP/06/149 of 13 February 2006, available at <http://www.europa.eu/rapid/>.

<sup>59</sup> *2007 starts Today: ‘European Year of Equal Opportunities for All’ Gets Green Light* (IP/06/712, 1 June 2006), available at <http://www.europa.eu/rapid/>.

<sup>60</sup> See the website available at [http://www.ec.europa.eu/employment\\_social/equality2007/index\\_en.htm](http://www.ec.europa.eu/employment_social/equality2007/index_en.htm).

Under 'representation' it states that 'an equal opportunities policy also has to try to provide all individuals with opportunities for becoming fully involved on the same footing in society'.

#### IV Conclusion

The above suggests that the EU is moving towards a more substantive concept of equality. There appears to be a realisation that prohibiting discrimination and prescribing equal treatment is not enough to tackle the patterns of inequality suffered by some groups in society and a recognition that there are structural barriers to full participation faced by vulnerable groups such as migrants, ethnic minorities, the disabled, older and younger people and others. Why has this shift taken place? In the discussions and negotiations before the Article 13 EC Directives were adopted, questions about concepts of equality do not appear to have played any great role. The Commission wanted to establish a common minimum standard of protection against discrimination across the EU. Anti discrimination measures aimed at formal equality are seen as providing this minimum standard of protection, as a first step in the fight against discrimination. To a large extent, the directives followed the existing legislation in the field of gender discrimination, where formal equality was the main aim, supplemented by provisions against indirect discrimination and for positive action. The minimum standards were set in 2000 (in the Race and Framework Directive). It is submitted that now the Member States have become more familiar with anti-discrimination rules, the idea of going beyond formal equality has started to crop up in the language of the Commission. This idea was not new: as we have seen, it was mentioned by the ECJ in a number of cases. Similar discussions on what aims equality laws should pursue took place in many Member States.<sup>61</sup> This shift in emphasis was based on the EU's experience in the field of gender discrimination that formal equality is not enough to tackle existing inequalities.

But what are the practical consequences of this shift? The Communication and the Proposal mention repeatedly the need for positive action measures to tackle the inequalities and structural barriers suffered by some groups. However, there are no specific policies or measures requiring or promoting positive action. May be it is too much to ask for such measures in a strategy paper, but the Communication makes it clear that the Commission is not planning to come forward at this stage with further legislative proposals based on Article 13 EC. Rather it will undertake an in-depth study into the relevance and feasibility of possible new measures to complement the current legal framework. The study will examine national provisions that go beyond the requirements of the Equality Directives and consider the relative merits of legislative and non-legislative measures. The results of the study should be available in autumn 2006.<sup>62</sup> This suggests that the current provisions allowing for, but not requiring,

<sup>61</sup> See, eg, the authors mentioned in *op cit* n 4 *supra*.

<sup>62</sup> *op cit* n 2 *supra*, at 6. In December 2006, the following studies were issued: A. McColgan, J. Niessen and F. Palmer, *Comparative Analyses on National Measures to combat Discrimination outside Employment and Occupation. A Mapping Study on Existing National Legislative Measures—and their Impact in—Tackling Discrimination outside the Field of Employment and Occupation on the Grounds of Sex, Religion or Belief, Disability, Age and Sexual Orientation* (VT/2005/062), Strand 1, available at [http://ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/pubst/stud/mapstrand1\\_en.pdf](http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_en.pdf), and Strand 2 (entitled *Comparative Analysis of Existing Impact Assessments of Anti-Discrimination Legislation*), available at [http://ec.europa.eu/employment\\_social/fundamental\\_rights/pdf/pubst/stud/mapstrand2\\_en.pdf](http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand2_en.pdf) (both Human

positive action, laid down in the Equality Directives, will not be changed or strengthened by new legislation in the near future. It is thus left to the ECJ to interpret these provisions, hopefully allowing for wider positive action than it has done in the past in gender discrimination cases. But it can only do so if cases are brought before it.

The emphasis on mainstreaming non-discrimination and equal opportunities for all is encouraging, as it does mean a greater focus on these issues in policy making. However, if the Draft Constitution is not going to become legally binding, there will be no legal basis for the mainstreaming duty except in relation to gender equality.

Therefore, there may be a shift towards a more substantive idea of equality in the EU, but this is not likely to be laid down in legislation at the EU level in the near future. Other non-legislative measures and policies could and will, hopefully, go further towards substantive and pluralist notions of equality and in this way complement the formal equality idea in the EU legislation. The OMC is a process that could possibly play a role here in setting common objectives and benchmarks, and providing for the exchange of good practices.

The European Year of Equal Opportunities for All could have positive effects: if it raises awareness of the benefits of diversity and of an inclusive society where everyone has the same opportunities, it might contribute to a shift away from formal equality. The European Year against Racism in 1997 appears to have had positive effects. The report of independent experts concluded that:

The Year succeeded in inspiring and concentrating efforts; reinforcing the exchange of experience between organisations working in this area; putting in place new networks and partnerships and reinforcing existing ones; involving organisations of immigrants and ethnic minorities in the conception and performance of projects; strengthening cooperation, both at national and local level, between authorities and institutions and the various partners; providing for follow-up mechanisms and forging a consensus on consolidating the role of the European Institutions.<sup>63</sup>

If the European Year against Racism started things moving and gave a boost to the fight against racism in Europe, and confirmed the role of the European institutions in this,<sup>64</sup> the European Year of Equal Opportunities for All might similarly start things moving towards a more equal society where equal opportunities for all exist and confirm the role of the European institutions in promoting such equal opportunities for all.

To answer the question posed in the title of this article, yes, the EU is slowly moving away from a formal idea of equality towards a recognition that equal treatment is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups and that positive measures might be necessary to compensate for this. The European Commission is, in its own words, looking for 'a more positive approach to equality'. However, where do the Member States stand in this? Will the Year create enough political determination to take further action against discrimination? The Commission appears to be using the language of equal opportunities and to be emphasising the idea of equal opportunities for all more and more often. It is suggested that it is doing so with the idea that if this language of equal opportunities is used and

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European Consultancy/Migration Policy Group, December 2006). The Commission also launched a public consultation on new anti-discrimination measures; see Commission Launches Public Consultation on New Anti-Discrimination Measures (IP/07/1006, 4 July 2007), available at <http://europa.eu/rapid/>. This article was written in August/September 2006 and has, therefore, not taken these studies into account.

<sup>63</sup> COM (1999) 268, *op cit* n 32 *supra*, at 20.

<sup>64</sup> *ibid*, at 24.

repeated often enough, the terms might become so familiar to the Member States that they will accept more and stronger measures to tackle inequality and barriers in society. In this way the use of the language might act as a catalyst for more EU action against discrimination.

*First Submitted: September 2006*

*Final Revision Accepted: February 2007*